

## HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

**BILL #:** CS/CS/CS/HB 149 Continuing Contracts

**SPONSOR(S):** State Affairs Committee and State Administration & Technology Appropriations Subcommittee and Constitutional Rights, Rule of Law & Government Operations Subcommittee, Alvarez and others

**TIED BILLS:** **IDEN./SIM. BILLS:** CS/CS/SB 656

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**FINAL HOUSE FLOOR ACTION:** 112 Y's

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**GOVERNOR'S ACTION:** Pending

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### SUMMARY ANALYSIS

CS/CS/CS/HB 149 passed the House on February 28, 2024, and subsequently passed the Senate on March 1, 2024.

In 1973, the Florida Legislature enacted the Consultants' Competitive Negotiation Act (CCNA), which requires state and local government agencies to procure the professional services of an architect, professional engineer, landscape architect, or registered surveyor and mapper using a qualifications-based selection process. Qualifications-based selection is a process whereby service providers are retained on the basis of competency, qualifications, and experience, rather than price.

The CCNA does not prohibit a continuing contract between a firm and an agency. A "continuing contract" is a contract for professional services entered into in accordance with the CCNA between a government agency and a firm whereby the firm provides professional services to the agency for several projects. The CCNA prohibits firms that are parties to a continuing contract from being required to bid against one another. Current law authorizes the use of a continuing contract for construction projects in which the estimated construction cost of each project does not exceed \$4 million, for study activities if the fee for professional services for each study does not exceed \$500,000, or for work of a specified nature as outlined in the contract required by the agency, with the contract being for a fixed term or with no time limitation except the contract must include a termination clause.

The bill increases the maximum limit for continuing contracts covered by the CCNA from an estimated per-project construction cost of \$4 million to \$7.5 million plus an annual increase based on the Consumer Price Index (CPI). Beginning July 1, 2025, the bill requires the Department of Management Services to adjust annually the maximum amount allowed for each individual project in a continuing contract by using the change in the June-to-June CPI and to publish the adjusted amount on its website.

The bill may have a positive, yet indeterminate fiscal impact on state and local government expenditures by increasing the dollar threshold for continuing contracts. See Fiscal Comments.

Subject to the Governor's veto powers, the effective date of this bill is July 1, 2024.

## I. SUBSTANTIVE INFORMATION

### A. EFFECT OF CHANGES:

#### Present Situation

##### Consultant's Competitive Negotiation Act

In 1972, Congress passed the Brooks Act,<sup>1</sup> which requires federal agencies to use a qualifications-based selection process for architectural, engineering, and associated services, such as mapping and surveying. Qualifications-based selection is a process whereby service providers are retained on the basis of competency, qualifications, and experience, rather than price.

In 1973, the Florida Legislature enacted the Consultants' Competitive Negotiation Act (CCNA),<sup>2</sup> which is modeled after the Brooks Act. The CCNA requires state and local government agencies<sup>3</sup> to procure the professional services<sup>4</sup> of an architect, professional engineer, landscape architect, or registered surveyor and mapper using a qualifications-based selection process.<sup>5</sup>

##### *CCNA Procurement Process*

The CCNA establishes a three-phase process for procuring professional services:

- Phase 1 – Public announcement and qualification.
- Phase 2 – Competitive solicitation.
- Phase 3 – Competitive negotiation.

During Phase 1, the public announcement and qualification phase, state and local agencies must publicly announce each occasion when professional services will be purchased for one of the following:

- A project,<sup>6</sup> when the basic construction cost is estimated by the agency to exceed \$325,000; or
- A planning or study activity, when the fee for professional services exceeds \$35,000.<sup>7</sup>

The public notice must include a general description of the project and indicate how interested firms<sup>8</sup> may apply for consideration.<sup>9</sup> A firm that wishes to provide professional services to an agency must first be certified by the agency as qualified to provide the needed services pursuant to law and the agency's regulations.<sup>10</sup> In determining whether a firm is qualified, the agency must consider the capabilities, adequacy of personnel, past record, and experience of the firm as well as whether the firm is a certified minority business enterprise.<sup>11</sup> Each agency must encourage firms desiring to provide professional services to the agency to submit annual statements of qualifications and performance data.<sup>12</sup>

<sup>1</sup> Pub. L. 92-582, 86 Stat. 1278 (1972).

<sup>2</sup> Ch. 73-19, Laws of Fla., codified as s. 287.055, F.S.

<sup>3</sup> "Agency" means the state, a state agency, a municipality, a political subdivision, a school district, or a school board. The term "agency" does not extend to a nongovernmental developer that contributes public facilities to a political subdivision under s. 380.06, F.S., or ss. 163.3220-163.3243, F.S. S. 287.055(2)(b), F.S.

<sup>4</sup> "Professional services" means those services within the scope of the practice of architecture, professional engineering, landscape architecture, or registered surveying and mapping, as defined by the laws of the state, or those performed by any architect, professional engineer, landscape architect, or registered surveyor and mapper in connection with his or her professional employment or practice. S. 287.055(2)(a), F.S.

<sup>5</sup> S. 287.055, F.S.

<sup>6</sup> (f) "Project" means that fixed capital outlay study or planning activity described in the public notice of the state or a state agency under s. 287.055(3)(a), F.S., and may include:

- A grouping of minor construction, rehabilitation, or renovation activities.
- A grouping of substantially similar construction, rehabilitation, or renovation activities. S. 287.055(2)(f), F.S.

<sup>7</sup> S. 287.055(3)(a)1., F.S. As used in the statute, CATEGORY TWO refers to purchases of \$35,000 or more and CATEGORY FIVE refers to purchases of \$325,000 or more. S. 287.017, F.S.

<sup>8</sup> "Firm" means any individual, firm, partnership, corporation, association, or other legal entity permitted by law to practice architecture, engineering, or surveying and mapping in the state. S. 287.055(2)(c), F.S.

<sup>9</sup> S. 287.055(3)(a)1., F.S.

<sup>10</sup> S. 287.055(3)(c), F.S.

<sup>11</sup> S. 287.055(3)(c) and (d), F.S.

<sup>12</sup> S. 287.055(3)(b), F.S.

During Phase 2, the competitive selection phase, an agency must evaluate the qualifications and past performance of interested firms and conduct discussions with at least three firms regarding their qualifications, approach to the project, and ability to furnish the required services.<sup>13</sup> The agency must then select at least three firms, ranked in order of preference, that it considers the most highly qualified to perform the required services. In determining whether a firm is qualified, the agency must consider such factors as the ability of professional personnel; whether a firm is a certified minority business enterprise; past performance; willingness to meet time and budget requirements; location; recent, current, and projected workloads of the firm; and the volume of work previously awarded to each firm by the agency, with the goal of equitably distributing contracts among qualified firms, provided such distribution does not violate the principle of selecting the most highly qualified firms. During this phase, the CCNA prohibits the agency from requesting, accepting, or considering proposals for the compensation<sup>14</sup> to be paid.<sup>15,16</sup>

During Phase 3, the competitive negotiation phase, an agency must first negotiate compensation with the highest ranked firm. If the agency is unable to negotiate a satisfactory contract with that firm at a price the agency determines to be fair, competitive, and reasonable, negotiations with the firm must be formally terminated. The agency must then negotiate with the remaining ranked firms, in order of rank, and follow the same process until an agreement is reached. If the agency is unable to negotiate a satisfactory contract with any of the ranked firms, the agency must select additional firms, ranked in the order of competence and qualification without regard to price, and continue negotiations until an agreement is reached.<sup>17</sup>

#### *Continuing Contracts under the CCNA*

The CCNA does not prohibit a continuing contract<sup>18</sup> between a firm and an agency.<sup>19</sup> A “continuing contract” is a contract for professional services entered into in accordance with the CCNA between an agency and a firm whereby the firm provides professional services to the agency for projects where the estimated cost of each project does not exceed a specified amount.<sup>20</sup> The CCNA prohibits firms that are parties to a continuing contract from being required to bid against one another.<sup>21</sup>

Current law authorizes the use of a continuing contract for construction projects in which the estimated construction cost of each individual project under the contract does not exceed \$4 million, for study activities if the fee for professional services for each individual study under the contract does not exceed \$500,000, or for work of a specified nature as outlined in the contract required by the agency, with the contract being for a fixed term or with no time limitation except the contract must include a termination clause.<sup>22</sup> The maximum per-project and per-study limits were put in place by the Legislature in 1988<sup>23</sup> and subsequently increased three times. In 1988, the maximum per-project and per-study limits were \$500,000 and \$25,000, respectively;<sup>24</sup> in 2002, the limits were increased to \$1 million and \$50,000;<sup>25</sup> in 2009, the limits were increased to \$2 million and \$200,000;<sup>26</sup> and in 2020, the limits were increased to \$4 million and \$500,000.<sup>27</sup>

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<sup>13</sup> S. 287.055(4)(a), F.S.

<sup>14</sup> “Compensation” means the amount paid by the agency for professional services regardless of whether stated as compensation or stated as hourly rates, overhead rates, or other figures or formulas from which compensation can be calculated. S. 287.055(2) (d), F.S.

<sup>15</sup> S. 287.055(4)(b), F.S.

<sup>16</sup> The CCNA did not prohibit discussion of compensation in the competitive selection phase until 1988, when the Legislature enacted a provision that allows consideration of compensation to occur only during the competitive negotiation phase. Ch. 88-108, L.O.F.

<sup>17</sup> S. 287.055(5), F.S.

<sup>18</sup> See s. 287.055(2)(g), F.S.

<sup>19</sup> S. 287.055(4)(d), F.S.

<sup>20</sup> S. 287.055(2)(g), F.S.

<sup>21</sup> *Id.*

<sup>22</sup> S. 287.055(2)(g), F.S. An entity may not use a continuing contract for work of a specified nature to exceed the monetary limits placed on construction projects and study activities. Op. Fla. Att’y Gen. 2013-28 (2013).

<sup>23</sup> Ch. 88-108, Laws of Fla.

<sup>24</sup> *Id.*

<sup>25</sup> Ch. 2002-20, Laws of Fla.

<sup>26</sup> Ch. 2009-227, Laws of Fla.

<sup>27</sup> Ch. 2020-127, Laws of Fla.

### Construction and Program Management Entities

Current law authorizes governmental entities<sup>28</sup> to contract with a construction management entity or a program management entity.<sup>29</sup> A construction management entity is responsible for construction project scheduling and coordination in both preconstruction and construction phases and is generally responsible for the successful, timely, and economical completion of a construction project.<sup>30</sup> A program management entity is responsible for schedule control, cost control, and coordination in providing or procuring planning, design, and construction services.<sup>31</sup> Both construction and program management entities must be procured pursuant to the CCNA and must consist of, or contract with, licensed or registered professionals for the specific fields or areas of construction.<sup>32</sup> The governmental entity procuring the services of a construction management or program management entity may choose to enter into a continuing contract<sup>33</sup> pursuant to the CCNA for construction projects where the estimated construction cost of each project does not exceed \$4 million.<sup>34</sup>

### Construction Cost

Construction costs have seen an upswing since 2020, largely driven by a confluence of factors exacerbated by the COVID-19 pandemic.<sup>35</sup> Escalating prices of essential materials, such as steel and lumber, influenced by disruptions in global supply chains, are prominent contributors as well as general inflation in the economy. In addition, labor shortages have led to higher wages, further impacting costs. However, construction input prices<sup>36</sup> have stabilized recently, falling about one percentage point from October 2022 to October 2023. The following chart shows the percent change to certain construction input and commodity prices as of October 2023:<sup>37</sup>

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<sup>28</sup> "Governmental entity" means a county, municipality, school district, special district as defined in ch. 189, F.S., or political subdivision of the state. S. 255.103(1), F.S.

<sup>29</sup> S. 255.103, F.S.

<sup>30</sup> S. 255.103(2), F.S.

<sup>31</sup> S. 255.103(3), F.S.

<sup>32</sup> S. 255.103, F.S.

<sup>33</sup> A continuing contract, for purposes of procuring a construction or program management entity, means a contract for work during a defined period on construction projects described by type, which may or may not be identified at the time of entering into the contract. S. 255.103(4), F.S.

<sup>34</sup> S. 255.103(4), F.S.

<sup>35</sup> Point Acquisitions, *Construction Costs Rising in 2022: Here's Why It's Happening*, available at <https://pointacquisitions.com/2022-rising-construction-costs/> (last visited November 30, 2023).

<sup>36</sup> Construction input prices refer to the costs associated with materials, labor, and other resources used in the construction industry.

<sup>37</sup> See United States Department of Labor Bureau of Labor Statistics, *Producer Price Index Detailed Reports for February 2020 and October 2023*, available at: <https://www.bls.gov/ppi/detailed-report/#2023> (last visited December 1, 2023).

	1-month	12-month	Since Feb. 2020
<b>Inputs to Industries</b>			
Inputs to construction	-1.2%	-1.1%	33.1%
Inputs to multifamily construction	-0.9%	0.8%	32.4%
Inputs to nonresidential construction	-1.1%	-0.7%	33.6%
Inputs to commercial construction	-0.7%	-0.3%	33.6%
Inputs to healthcare construction	-0.7%	-0.2%	33.4%
Inputs to industrial construction	-0.9%	1.1%	30.7%
Inputs to other nonresidential construction	-1.2%	-0.9%	33.7%
Inputs to maintenance and repair construction	-1.3%	-2.0%	31.8%
Inputs to highway and street construction	-1.2%	0.0%	31.4%
<b>Commodities</b>			
Adhesives and sealants	0.1%	1.8%	28.9%
Concrete products	0.7%	9.7%	30.5%
Construction machinery and equipment	0.0%	6.0%	23.6%
Copper wire and cable	-1.3%	2.7%	24.2%
Crude petroleum	-2.9%	-3.0%	56.9%
Fabricated structural metal products	0.8%	-0.7%	42.3%
Insulation materials	-0.3%	1.6%	31.0%
Iron and Steel	-2.3%	-6.1%	40.79%
Lumber and wood products	-0.3%	-6.5%	22.3%
Natural gas	10.9%	-54.9%	40.8%
Plumbing fixtures and brass fittings	0.5%	1.4%	16.1%
Prepared asphalt, tar roofing, and siding products	0.7%	3.9%	34.4%
Steel mill products	-2.5%	-9.9%	47.0%
Switchgear, switchboard, industrial controls equipment	0.2%	6.3%	32.0%
Unprocessed energy materials	-0.3%	-16.2%	60.2%

### Consumer Price Index

The Consumer Price Index (CPI), compiled by the United States Department of Labor and published monthly, measures the average change over time in the prices paid by urban consumers for a specified grouping of consumer goods and services.<sup>38</sup> The CPI encompasses various categories including food, housing, clothing, medical care, and transportation, and provides a comprehensive view of price movements. It serves as a key indicator of inflation and aids policymakers, businesses, and the public by offering insights into inflation trends and potential economic impacts.<sup>39</sup> The CPI increased by approximately 19 percent from February 2020 to October 2023. Comparatively, the CPI increased approximately 3 percent from October 2022 to October 2023.<sup>40</sup>

### Effect of the Bill

The bill increases the maximum limit for continuing contracts covered by the CCNA from an estimated per-project construction cost of \$4 million to \$7.5 million plus an annual percentage increase based on the CPI. Beginning July 1, 2025, and each July 1 thereafter, the Department of Management Services (DMS) must adjust the maximum amount allowed on the preceding June 30 for each individual project in a continuing contract by using the change in the June-to-June CPI for All Urban Consumers issued

<sup>38</sup> The CPI for All Urban Consumers (CPI-U) is the "headline CPI number" and the one most often cited. However, the United States Department of Labor publishes other indexes, such as the CPI for Urban Wage Earners and Clerical Workers (CPI-W), the Chained CPI for All Urban Consumers (C-CPI-U), and an average price index. See United States Department of Labor Bureau of Labor Statistics, *Consumer Price Index: Presentation*, available at <https://www.bls.gov/opub/hom/cpi/presentation.htm#interpreting-an-index> (last visited January 30, 2023).

<sup>39</sup> United States Department of Labor Bureau of Labor Statistics, *Consumer Price Indexes Overview*, available at <https://www.bls.gov/cpi/overview.htm> (last visited December 1, 2023).

<sup>40</sup> See United States Department of Labor Bureau of Labor Statistics, *CPI Inflation Calculator*, available at [https://www.bls.gov/data/inflation\\_calculator.htm](https://www.bls.gov/data/inflation_calculator.htm) (last visited December 1, 2023).

by the Bureau of Labor Statistics of the United States Department of Labor. The bill requires DMS to publish the adjusted amount on its website.

**B. SECTION DIRECTORY:**

Section 1 amends s. 255.103, F.S., relating to construction management or program management entities.

Section 2 amends s. 287.055, F.S., relating to acquisition of professional architectural, engineering, landscape architectural, or surveying and mapping services; definitions; procedures; contingent fees prohibited; penalties.

Section 3 provides an effective date of July 1, 2024.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

The bill may have a positive, yet indeterminate fiscal impact on private sector businesses that provide professional services as defined in the CCNA, or that provide construction management or project management services, by allowing those entities to enter into larger contracts for projects under a continuing contract. Increasing the threshold for entering into continuing contracts would save those entities contractual and workload expenditures associated with having to undergo the CCNA procurement process for projects that exceed the current statutory threshold.

**D. FISCAL COMMENTS:**

The bill may have a positive, yet indeterminate fiscal impact on state and local government expenditures by allowing the state or local government to enter into larger continuing contracts under the CCNA. By retaining a larger continuing contract under the CCNA, the state or a local government could potentially save on contractual and workload expenditures associated with the procurement of services on a per-project basis. Governments, however, may spend more on these contracts as they are adjusted based on CPI increases.

In addition, DMS may incur costs related to its requirement to annually adjust the maximum amount allowed for each individual project in a continuing contract based on the June-to-June CPI and to publish that amount on its website; however, any additional costs should be absorbed within existing resources.